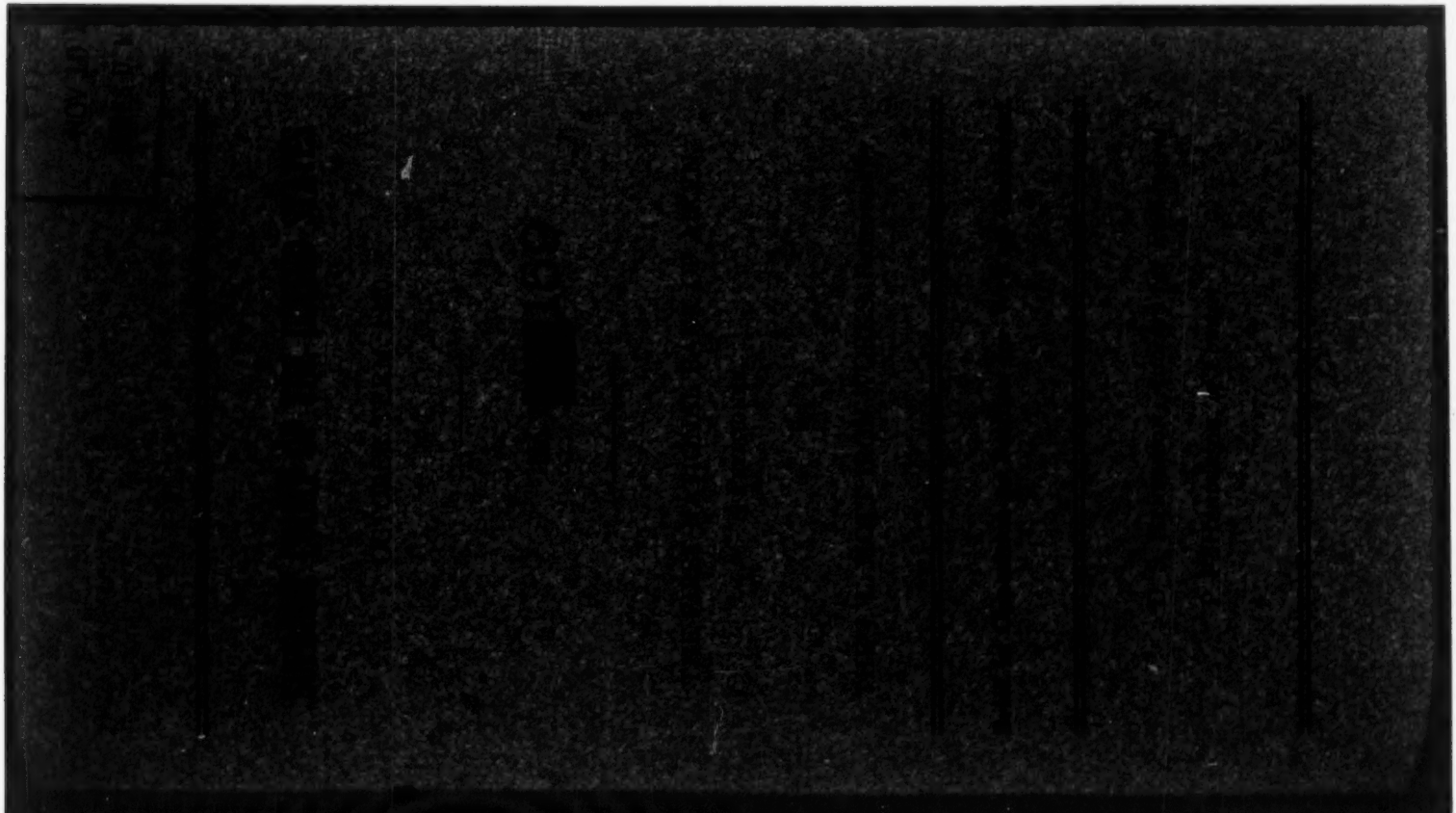

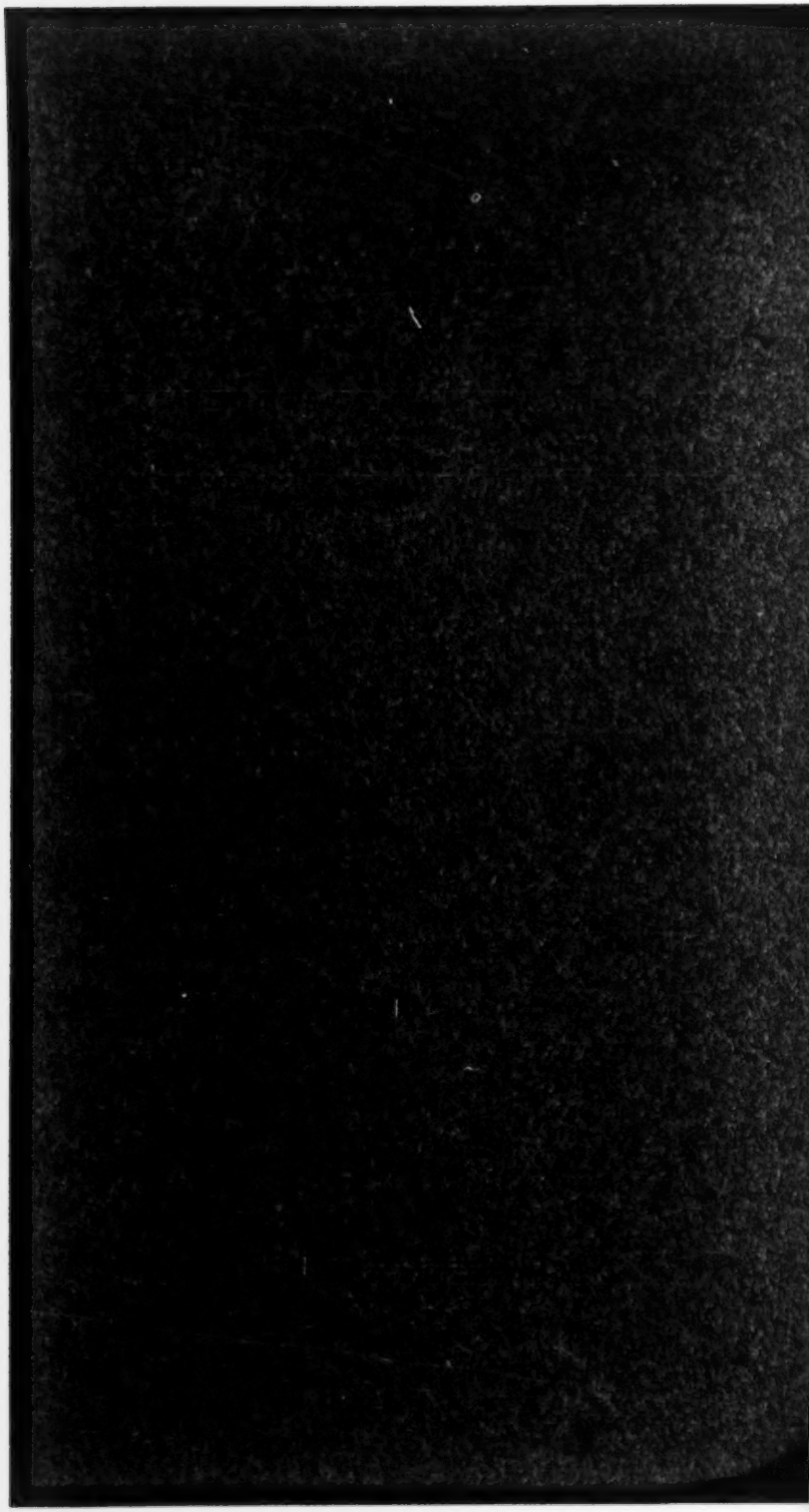

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 594

THE FIRST NATIONAL BANK OF AIKEN,
PETITIONER,

vs.

THE J. L. MOTT IRON WORKS, RESPONDENT.

Brief in Opposition to Petition for Writ of Certiorari.

D. S. HENDERSON, *Attorney for Respondent.*
P. F. HENDERSON, *of Counsel.*

STATEMENT.

During 1916 McGhee & McGhee were building a hospital in Aiken. They awarded the contract for furnishing and installing the plumbing and heating apparatus and fixtures to the Kaiser Co., which concern was not financially responsible. The contract is set out at folios *222-228* of the brief used upon appeal to the Supreme Court of South Carolina. All folio references made herein are to such brief.

The testimony shows that this contract, although undated upon its face, was entered into on the 16th day of August, 1916 (f. 78), and on that day it was assigned to the First

National Bank (f. 229), and upon the same day, McGhee, the contractor, as part and parcel of the transaction wrote on the back and signed the following endorsement:

> "We hereby agree to the above transfer and agree to make all checks payable to the above named bank on this contract."

The cashier of the bank was summoned and placed on the witness stand by the respondent. The Court is requested to read over his testimony in full (ff. 63-99). The result of the same is that at the time the contract was assigned that the bank agreed to make to Kaiser Company (f. 84) a "running loan," and took this contract as collateral security therefor. That during the fall it loaned to Kaiser Co., thereupon, as much as $4,700, some of which was repaid, but that when Dec. 2d, 1916, arrived, a considerable amount was still due to the bank by Kaiser Co.; and that since this date other loans have been made upon the same security, as evidenced by the fact that checks received by the bank as a result of this transaction, after said date, has not been sufficient completely to liquidate the line of credits.

On Dec. 2, 1916, the guaranty was made to the Mott Company by a telegram of the bank. The cashier's testimony shows that when this date arrived the bank realized that in order for the contract to be completed, which would make the money available, and the contract worth something as security, that it was necessary to make the guaranty. The following is the testimony of the cashier on this point (ff. 81-2):

> "Q. 'You knew that lavatories, water tanks, and all kinds of plumbing fixtures were necessary to go into this hospital for completion of the job?' A. 'I felt the entire contract or order of the good was necessary.'

> Q. 'You knew when you made the guaranty that in order for these men to complete this contract which they had assigned to you gentlemen as special security for $4,700 worth of loans, that they had to have this shipment from the Mott Co., in order to complete this job?' A. 'It seems so.'
>
> Q. 'You have no objection to that statement?' A. 'It seems that way to me.'"

The Mott Company accepted the guaranty and shipped the goods and have done all necessary acts to keep the guaranty alive.

As directly affecting the question before the Court, we especially call the Court's attention to the fact that although the general contractor, McGhee, had in writing agreed to make all checks which would have amounted to $7,800 to the First National Bank, that the bank *for some absolutely undisclosed reason* adopted the course of allowing the Kaiser Company to collect the money for the contract (ff. 97-6) and that the bank actually ~~exercised~~ a written waiver (Ex. 5, f. 230) *by which it permitted checks amounting to $5,468 to be paid direct to Kaiser Co., instead of being paid to the bank.* The cashier, in this connection, testified (f. 93) that it was the intention of the bank in executing this paper to agree to and ratify the fact that this large sum of money which would have been more than sufficient to have paid the Mott Company's bill, which the bank had guaranteed, be paid to the Kaiser Co., instead of to the bank.

In addition thereto, it appears (ff. 97-8) that there remains the sum of $1,373.28, which, although McGhee had agreed to make all checks to the bank, the bank has by mere inaction allowed McGhee, in part to pay out for Kaiser Company's benefit (f. 144), and in part simply to retain.

It appears that the bank received direct, on account of the contract, check for the sum of $1,105.28. In other words, *the bank has been the direct recipient* from the contract, for the completion of which the plumbing fixtures were necessary, *of the sum of $1,105.28. It voluntarily waived its right to receive $5,408*, and it has neglected to force McGhee to pay in $1,373.28.

It has had ample opportunity completely and fully to protect its guarantee to the Mott Company, but for some reason, which it has not seen fit to explain, although its president and cashier were both on the witness stand, it has allowed a great deal more money than the amount of the bill of the Mott Company ($2,365.50) to slip away from it.

Both the Circuit Court and the Supreme Court of South Carolina have decided all issues in favor of this respondent and given judgment for the full amount claimed, with interest.

The action, under a stipulation (f. 59) signed by both defendants, was brought against Kaiser Company and First National Bank jointly. The verdict was rendered jointly and against both defendants. The bank alone petitions herein.

AUTHORITIES.

Citizens Central National Bank v. Appleton, 216 U. S., 196, 83 N. E., 471, 12 R. C. L., 1081.

Peoples Bank v. Manufacturers National Bank, 101 U. S., 181.

Ellis v. Citizens National Bank, 6 Am. L. Rep., 166.

Hitchcock v. Galveston, 96 U. S., 351.

American National Bank v. National Wall Paper Co., 77 Fed. Rep., 85.

First National Bank v. Greenville Oat Co., 60 S. W., 828.

Barnes Fed. Ct., 1919, Sec. 9161.

National Bank v. National Exchange Bank, 92 U. S., 127.

Western National Bank v. Armstrong, 152 U. S., 231.

Clement National Bank v. Vermont, 231 U. S., 150.

California v. Kennedy, 167 U. S., 367.

National Bank of Ottawa v. Converse, 200 U. S., 425.

Merchants Bank v. Wehrmann, 202 U. S., 300.

Miller v. King, 223 U. S., 510.

ARGUMENT.

As we understand it, this Court will uphold the decision of the Supreme Court of South Carolina, even though a Federal question may be incidentally involved, if the facts as found by the South Carolina Court present any independent reasoning, aside from the Federal question, by which the decision below can be upheld. *Murdock v. Memphis*, 20 Wall., 625.

PETITIONER'S POINT 1.

The burden of petitioner's argument seems to be that the present action is upon the guaranty direct; that the guaranty is *ultra vires* and particularly that the bank has received a benefit less than the amount of the guaranty, and hence that no recovery can be had.

The argument inferentially admits that if the bank receives or is chargeable with a benefit equal to the amount of the guaranty, that the guaranty would be good. We shall endeavor to show the Court that these are the facts; hence, that the inherent validity of the guaranty is not involved and that no Federal question as to the construction of the National Banking Act is necessarily involved, but that the decision of the Supreme Court of South Carolina can

be sustained without passing upon the validity of the guaranty.

What did the bank get out of the transaction, and what is it chargeable with? As we have pointed out, the Supreme Court of South Carolina has held that the bank received $1,105.28, and that it could have gotten, but waived the receipt, and hence, as between it and the Mott Company, is responsible for $5,468.

We submit that the decision of this Court in *Citizens Central National Bank v. Appleton, Receiver*, 216 U. S., 196, is directly in point.

An examination of the decision of the Court of Appeals of New York, found in 83 N. E., 471, reveals the fact that one Samuels owed the National Bank $10,000 and that with the guaranty of the National Bank, he borrowed from the Cooper Exchange Bank $12,000, the National Bank receiving the $10,000 that Samuels owed it. Samuels failed to pay and the National Bank plead *ultra vires*.

A direct action upon the debt was brought in New York upon a complaint which is very similar to the one in the present action. The National Bank demurred to the complaint claiming that no direct recovery could be had against it, and that the guaranty was *ultra vires*. The Supreme Court of New York sustained the demurrer, but the Court of Appeals reversed this decision. The matter then went to this Court which cited numerous authorities to the effect that a general guaranty is *ultra vires*, but the Court held (after plaintiff's counsel had conceded that a recovery could not be had for more than $10,000) that in that action which was a direct action at law, a recovery against the National Bank would be sustained. The Court said:

> "It is entirely clear that the judgment against the Bank * * * was consistent with sound legal principles

> and *was intrinsically right* even if the guaranty in question was beyond the power of the guaranteeing bank, under the National Banking Laws. Whatever may be said as to the validity of the written guaranty, now alleged to be illegal, *the judgment can be supported* as based wholly on the implied contract, which made it the duty of the Ceneral National Bank, under the facts disclosed, to account to the Cooper Exchange Bank for the money obtained from the lender in execution of the agreement made by the former with the borrower." (Italics mine.)

We submit that the result of this litigation is that the plaintiff therein voluntarily waived the right to recover more than the $10,000 that the National Bank actually got; hence, the Supreme Court of the United States did not pass upon the question as to whether more money can be recovered than the amount directly traceable to the National Bank, but the Court did absolutely establish the fact that a *recovery* may be had for such an amount as is chargeable against the bank.

This, indeed, is practically admitted by the petitioner herein, except for the fact that it contests the form of the present action.

Now, in view of the facts as found by the Supreme Court of South Carolina, we submit that the present case comes squarely up to the Appleton case. We submit that the Supreme Court of South Carolina has found that the record absolutely supports the finding that the First National Bank of Aiken actually received benefits to the extent of $1,105.28 in cash; that it waived payments amounting to $5,468, and that it has wilfully refrained from availing itself of the right to force McGhee to pay a balance of $1,373.28. Hence, we submit that the First National Bank of Aiken is

chargeable with the whole of $7,800, which is in excess of the amount due to Mott Co.

As between the bank and the Mott Company, the bank stands in the position of a guarantor which has taken a security available to it alone. As is said in 12 R. C. L., p. 1081:

> "A guarantor, like other contractual parties is not required to insist upon all his legal rights, but may waive his rights either as to the performance of, or as to the avoidance of, a contract."

The guarantor may waive notice of acceptance, notice of default, the substantial change of a contract or many other things, *but we submit that this is a personal privilege to the guarantor which it personally may waive, but which it may not waive to the detriment of a third party.* In short, we submit that the First National Bank of Aiken must be held to be responsible for the whole of the $7,800 which it could have gotten, but which it has failed to get, and this being true, that it is clearly responsible under this guaranty, with no Federal question arising.

But the petitioner argues that a direct action has been brought, and that as they claim that the guaranty is *ultra vires*, that an action for money had and received must have been brought. To this we answer:

(a) That in the Appleton case, *supra*, a complaint very similar to that in the present case was brought. It appeared incidentally in the trial of the case that the bank had gotten as much as $10,000 and the Supreme Court of the United States said that the judgment rendered "was consistent with sound legal principles and was intrinsically right, even if the guaranty in question is beyond the powers of the guaranteeing bank * * * the judgment can be supported as based wholly on the implied contract."

(b) The defendant's pleading herein made the issue in this case practically one upon an implied ~~power~~ promise. The petitioner has shown in its brief that if it desired to test solely the naked question of the validity of the guaranty, it should have demurred. It failed to demur, but answered, setting up not only the alleged invalidity of the guaranty under the National Bank Act, but also setting up that the guaranty was invalid because of representations of the plaintiff and on account of the alleged delay in the giving of notice to default by the plaintiff, and caused the Court to charge the jury (f. 353):

> "The jury is charged that when a National Bank cashier or any officer of the bank makes a guaranty of goods, wares and merchandise, the bank can refuse payment thereupon when it will be improper or unjust to the bank or stockholders or depositors to perform unless the guaranty was made for the protection of its own rights or as an incident to the transaction of its own business."

In other words, the defendant by its acts in the trial of the case, did not stand wholly upon the alleged *ultra vires* of the guaranty, but brought in testimony so as to bring the question of the benefit accruing to the bank in issue,—in other words, the issue of the "implied promise" was brought prominently into the case by the bank.

(c) Further, we submit that as the action was pending in a State Court, and not a Federal Court, *that the approval of the form of the action by the Supreme Court of South Carolina is controlling.*

Again, we submit that the decisions of the Supreme Court of South Carolina can be upheld on the theory *that the bank was by assignment the owner of the contract* to put in

the plumbing; that it had to have the fixtures in order to get the work done and make the contract worth anything, and that hence, the act of the purchase of the fixtures was virtually the acts of the bank itself.

This position is directly upheld by the decision of the Supreme Court of the United States in the case of *Peoples Bank v. Manufacturers National Bank*, 101 U. S., 181.

In this decision it appears that a customer of a National Bank delivered to it ten promissory notes to be negotiated to the plaintiff pursuant to a prior agreement between the customer and the said National Bank, to the effect that the latter should negotiate the notes and apply the proceeds to the indebtedness due the bank; upon this being done the bank guaranteed the notes and received the money. It was held by this Honorable Court that the bank was liable for the guaranty, although the notes were the notes of a customer.

The same general doctrine is further upheld by a recent decision of the Supreme Court of New Mexico, in the case of *Ellis v. Citizens National Bank*, 6 ~~L. R. A.~~, 166. This decision reviews practically every authority available upon this question, and is the most recent decision upon the general question involved that has come to our attention. The Court said:

> "The bank was hard-pressed for money. Humble owed it past due obligations which he was unable to meet. It put him forward as a borrower for the purpose of procuring money and gave a written guarantee for the repayment of the loan to be made to Humble. The proceeds of the loan were all received by the bank and converted to its use. Under such circumstances we think, beyond question, that the contract was not *ultra vires*, and the bank is liable for the same."

Now, apply these two decisions to the present case, and we find under the facts as determined by the Supreme Court of South Carolina that the National Bank of Aiken was the real owner of the contract in question. That as in the Peoples Bank case, decided by this Honorable Court, the said National Bank of Aiken was actuallly acting in its own behalf in making the guaranty and has become chargeable with the fruits of the contract, and as the Supreme Court of New Mexico has put it, the National Bank of Aiken "put forward" the Kaiser Company to purchase the plumbing materials, for the purpose of making the contract valuable, and we submit that the purchase of the plumbing materials under those circumstances was as much the act of the First National Bank of Aiken as in the other two decisions above set out.

Finally, upon this point, we submit that there is eminent authority for the further position that if there be any benefit whatsoever to the bank accruing from the transaction, that the bank is estopped from claiming *ultra vires*.

Upon this point we shall content ourselves simply with citing a few authorities, principally by Federal Courts. In *Hitchcock v. Galveston*, 96 U. S., 351, in discussing the doctrine of *ultra vires*, as applying to a corporation, this Court said:

> "Having received benefits at the expense of the other contracting party it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform."

In *American National Bank v. National Wall Paper Co.*, 77 Fed. Rep., 85, the Circuit Court of Appeals, in holding

the guaranty of a National Bank to be valid, in a case in which said National Bank, in order to collect a debt, had guaranteed a wall paper bill of a corporation which it had created in order to recoup a threatened loss, said, approving the language of Thompson on Corporations:

> "The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers and has received the fruits and benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it."

In *First National Bank v. Greenville Oil Co.*, 60 S. W., 828, the Supreme Court of Texas in a case in which a guaranty had been made by a National Bank of feed bill, upheld the guaranty and gave judgment against the bank for an amount which was far in excess of the amount that the bank received out of the transaction.

This doctrine that a guaranty made by a bank for the protection of its own rights and out of which it receives a benefit, renders the guaranty valid, is established in South Carolina in the case of *Ayer v. Hughes*, 87 S. C., 387.

Of the cases cited by petitioner, in the *Bank v. Smith* and *Bowens v. Needles*, bank cases, there *was no benefit* whatever coming to the banks, while the De la Vergne case does not involve a question of guaranty.

PETITIONER'S POINT 2.

Was the guaranty *ultra vires*, under the circumstances of this case?

The National Banking Act confers upon National Banks (Barnes' Fed. Code 1919, Sec. 9161) the right "to exercise

by its board of directors, or duly authorized officers or agents subject to law, *all such incidental powers* as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes * * * by loaning money on personal security. * * * "

No direct inhibition against making a guaranty exists. Incidental powers of the bank have been rather liberally construed by this Court in *National Bank v. National Exchange Bank*, 92 U. S., 127:

> "Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. * * * This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met and debts due to it collected or secured. *The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. * * * Banks may do, in this behalf, whatever natural persons could do under like circumstances.*"

The foregoing language is quoted with approval in *Western National Bank v. Armstrong*, 152 U. S., 231, and in *Clement National Bank v. Vermont*, 231 U. S., 140.

We submit that the *guaranty herein was not ultra vires, because as incidental to the power to loan money on personal security, the bank might do what was necessary, even though it incurred a liability, to make the personal security available and valuable to it.*

This proposition, we submit, is supported by the line of decisions of this Court, which established the doctrine that

although a National Bank is not given the authority to acquire the stock of another corporation, that if it takes such stock as collateral security to a loan, and if afterwards the loan is unpaid, then the bank may buy in the stock and become its owner, although purchasing stock is not permitted by the National Bank Act; and, further, and especiallly, that having become its owner, it becomes legally subject to stockholders' liability and may be sued in a direct action should the corporation whose stock it has acquired fail, for the statutory stockholders' liability.

We quote from *California v. Kennedy*, 167 U. S., 367:

> * * * "It is settled that the United States Statutes relative to National Banks constitute the measure of the authority of such corporations and that they cannot rightfully exercise any powers except those expressly granted, or *which are incidental* to carrying on the business for which they are established *Logan County Bank v. Townsend*, 139 U. S., 67, 73. No express power to acquire the stock of another corporation is conferred upon a National Bank, but it has been held that, *as incidental to the power to loan money on personal security* a bank may, in the usual course of doing business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. *National Bank v. Case*, 99 U. S., 628. So, also, a National Bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness."

In this decision the English case of the Royal Bank of India is quoted with approval to the effect that "as inci-

dental to the power to advance money on deposit of shares of stock, a corporation *might do such acts as were reasonable and proper to make the security available.*"

This doctrine has been recognized repeatedly by the Supreme Court of the United States. See *National Bank of Ottawa v. Converse*, 200 U. S., 425; *Merchants Bank v. Wehrmann*, 202 U. S., 300.

We submit that the gist of the doctrine is simply that the bank, in the exercise of its incidental power and in the exercise of a sound business prudence, *may do what is necessary and proper to render the security valuable and available.*

Applying this doctrine to the present case, we submit that as the bank had taken the contract between McGhee and the Kaiser Co., as collateral security for a series of loans, that by the same course of reasoning it was within the incidental power of the bank to follow the sensible course when it found that it was necessary in order to get the fixtures and fittings that were essential for the completion of the plumbing job, to guarantee the order for the plumbing fixtures in order to make the contract which had been assigned to it as collateral security worth something.

Along the same general line, we cite the decision of this Honorable Court in the case of *Miller v. King*, 223 U. S., 510.

In this case a judgment had been assigned to a National Bank as security for a loan which was not paid at maturity. The bank brought action upon the judgment styling itself the trustee of the judgment creditor. The defendant took the position that a National Bank could not act as trustee. The Supreme Court said:

> "A National Bank cannot act as technical trustee and hold land for the benefit of third persons. It cannot, for example, act as trustee under a railroad mortgage,

not take property to be held for the wife, of the grantor, with remainder to his children, but under Rev. Stat., Sec. 5136, 'It may exercise all such incidental powers as shall be necessary to carry on banking,' and it may, therefore, act as a fiduciary and occupy a trust relation *in matters connected with that business. * * * At the time of the transfer no suit was contemplated*, and, indeed, none was necessary, because the money was immediately paid by Porter. *Suit only became necessary* when the amount collected by Miller was later improperly paid over by him to the Moss Co. There is nothing in this transaction which was so disconnected with the banking business as to make it in violation of Rev. Stat., Sec 5136, even if the defendant could raise such a question. *Kerfoot v. Bank*, 218 U. S., 281. *The laws of Oregon permitted an action to be maintained in its own name.*"

We submit that the gist of this decision is simply that after the bank has taken a personal security as collateral to a loan, *that it may do those things incidental to the collection of its money which are necessary to make the security available and valuable.*

Along the same general line is the case of *Clement National Bank v. Vermont*, 231 U. S., 140, in which the act of a National Bank in agreeing with the State of Vermont that it would return and pay taxes on the deposits of customers, was upheld when the bank endeavored to repudiate it, as being an incident to the banking business, although the bank by doing so incurred a liability not contemplated by the National Banking Act.

Finally, it is to be noted that the position taken before the Supreme Court of South Carolina against the validity of the guaranty because the same was not passed upon by the

board of directors, has not been pressed in this Court, and is not now before this Court. Ample authority could be cited if the same were necessary, upon this point.

It is respectfully submitted that there is not sufficient ground for granting the writ of *certiorari* in this case.

D. S. HENDERSON,
Respondent's Attorney.

P. F. HENDERSON,
Of Counsel.

November 2, 1920.